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NEW HAMPSHIRE WATER COUNCIL
APPEAL

05-02 WC

Appeal of Raymond St. Laurent)
And)
B&S Septic Service & Pumping)
211 Dowboro Road)
Pittsfield, NH 03263)

**ADMINISTRATIVE ORDER
NO. WD 05-002**

NOW COMES Raymond St. Laurent and B&S Septic Service & Pumping and appeals the February 1, 2005 Administrative Order of the Water Division, and states the following in support thereof:

INTRODUCTION

Raymond St. Laurent has lawfully operated B&S Septic & Service Pumping (B&S) in substantial compliance with state regulations since 1988. DES changed the setback distance from abutters from 100 feet to 500 feet in 1999. Two years after their adoption, DES sought to require B&S to comply with the new setback distance. B&S had insufficient land space to meet the 500 foot setback. DES has, however, proposed new rules that would reduce the setback requirement to 200 feet. B&S has the space to meet the proposed new setback requirement. B&S's present operation poses no immediate threat to the environment as verified by the most recent monitoring well test results. While B&S was attempting to work toward a solution, DES, without any advanced notice, issued the cease and desist order that is the subject of this appeal. As a result of the order, B&S is unable to use its three septage lagoons. Compliance with the order since February 1, 2005, has forced B&S to incur losses, including the expense of transporting all of its customers' septage to wastewater treatment plants around the state.

In February of 2005, B&S filed a Petition for Declaratory Relief in the Merrimack County Superior Court to challenge DES's retrospective application of the 500 foot setback requirement to its pre-existing operation, and raising other claims and challenges.

RELIEF SOUGHT

Raymond St. Laurent and B&S are aggrieved by the cease and desist order. B&S and Raymond St. Laurent respectfully request that the Water Council rescind the Water Division's Administrative Order (No. WD 05-002) (See attached AO). B&S submits that the order is unfair and unreasonable in light of the circumstances of this case. Moreover, the rules failed to provide any equitable procedure to obtain a variance when strict compliance with the rules was not possible. The order exceeds DES's authority under RSA 485-A:42 and RSA 485-A:4 as B&S acquired vested rights and is grandfathered under the 100 foot setback requirement. The current rule is inapplicable to B&S on the ground that it is invalid as an arbitrary and unscientifically supported rule, is an unconstitutional retrospective rulemaking in violation of the state and federal constitutions, and constitutes a taking in violation of their state and federal constitutional rights. Lastly, DES is barred from enforcing the rule on the grounds of the equitable principles of waiver, estoppel and/or laches due to DES's failure to enforce its new rules in a timely fashion and other actions by DES.

STATEMENT OF FACTS

1. On March 7, 1988, the DES Waste Management Division approved B&S's permit application to operate a septage disposal facility that included three septage lagoons.

2. B&S met the existing setback requirement of 100 feet.
3. B&S has operated continuously since 1988.
4. In December of 1993, B&S applied to the DES Groundwater Protection Bureau for a groundwater discharge permit and paid the required application fee of \$1,000.00.
5. B&S heard nothing from DES until July 3, 1996, when they wrote a letter to B&S advising that they lacked a Groundwater Discharge Permit and the DES letter requested more information.
6. On or about September 12, 1997, DES granted B&S a five year groundwater discharge permit to discharge up to 250,000 gallons/year of domestic septage into its three lagoons.
7. Effective May 5, 1999, DES adopted new rules for septage management and new facility permit requirements. NH Code Admin Rules Env-Ws 1600.
8. By its wording, the new Facility Permit Requirements contained in Env-Ws were only intended to apply to proposed septage facilities and not facilities licensed under the preexisting rules, such as B&S.
9. The new Facility Permit Requirements prohibited the operation of a septage facility within five hundred (500') feet of a property line. Env-Ws 1608.08(f), Table 1608-I.
10. B&S, which had always operated its lagoons in the same location on the property, could not meet the new setback requirement.

11. DES's adoption of a 500 foot setback was arbitrary and capricious and lacked any scientific support or basis.

12. For the next two years, DES took no action against B&S to enforce the new rules, including the 500 foot setback requirement.

13. When B&S's groundwater discharge permit expired on September 11, 2002, it applied to DES for a one year waiver of the new rules (Env-Ws 1600) including the 500 foot setback because DES expected to change the setback to 200 feet.

14. On September 23, 2002, DES wrote to B&S approving the requested waiver and allowing B&S to continue to operate under its expired groundwater permit.

15. DES failed to adopt the proposed changes to the rules that would have reduced the setback requirement to 200 feet.

16. B&S was forced to apply for a waiver of the 500 foot setback.

17. By letter dated August 21, 2003, DES denied the waiver request on the ground that it denied another facility's waiver request.

18. DES's denial of B&S's waiver request was arbitrary and capricious.

19. On April 9, 2004, DES issued an Administrative Order against B&S for continuing to operate without a facility permit. The Order directed B&S to apply for a facility permit or close.

20. B&S applied for a facility permit.

21. By a letter dated September 2, 2004, DES denied B&S's facility permit application primarily on the ground that B&S failed to comply with the 500 foot setback or, in the alternative, obtain setback waivers from the abutters. The application also

lacked certain required information including a hydrologic study which B&S could readily supply after-the-fact.

22. Since B&S's inception it has co-existed with its abutters from whom a consent to operate was never required.

23. One abutter runs a competing septage disposal business and will not waive the current setback requirement. He has, however, offered to sell his land to B&S for an unreasonably high price.

24. The current setback requirement permits B&S's abutters with whom it has co-existed with for many years to suddenly have an unfair advantage over the business.

25. B&S provides a valuable service to New Hampshire residents living in multiple counties, including Merrimack County, who will be inconvenienced if it is forced to close its septage facility and it would result in increased loads to other wastewater treatment facilities located in Concord, Franklin and Northwood, among others.

26. Due to the nature of the septage hauling business it is beneficial to B&S, and the public it serves, to be able to pump and remove septage at times when the wastewater treatment facilities are closed. This benefit will be lost unless B&S is allowed to continue to operate its facility.

27. Ray St. Laurent's and B&S's vested property rights and privileges which they acquired through the investment of significant time, expense and other efforts over the years will be impaired or destroyed completely through the application of the permit facility regulations that require, among other things, a 500 foot setback requirement.

Respectfully Submitted,

Ray and Betty St. Laurent, individually and
Ray St. Laurent d/b/a B & S Septic Service
& Pumping

By their attorney,

The Law Office of Geoffrey J. Ransom,
P.L.L.C.

COPY
Geoffrey J. Ransom
Two Eagle Square
Concord NH 03301
(603) 228-8888

Date: 2-26-05

Raymond St. Laurent
B&S Septic Service & Pumping
211 Dowboro Road
Pittsfield, NH 03263

**ADMINISTRATIVE ORDER
No. WD 05-002**

February 1, 2005

A. INTRODUCTION

This Administrative Order is issued by the Department of Environmental Services, Water Division to Raymond St. Laurent pursuant to RSA 485-A:4 and RSA 485-A:42. This Administrative Order is effective upon issuance.

B. PARTIES

1. The Department of Environmental Services, Water Division ("DES"), is a duly constituted administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, NH 03301.
2. Raymond St. Laurent is an individual having a mailing address of 211 Dowboro Road, Pittsfield, New Hampshire 03263.

C. STATEMENTS OF FACTS AND LAW

1. RSA 485-A:4, XVI-a authorizes DES to regulate the removal, transportation, and disposal of septage through administration of a permit system. Pursuant to RSA 485-A:6, X-a, the Commissioner of DES has adopted NH Administrative Rules Env-Ws 1600 ("the Septage Rules") to implement this program.
2. Raymond St. Laurent is the owner, operator and property owner of the B&S Septic Service and Pumping ("B&S") and septage lagoon facility located at 211 Dowboro Road in Pittsfield, New Hampshire ("Facility"). The Facility consists of three unlined septage lagoons and an adjacent septage solids storage bunker.
3. B&S disposes of septage liquid via infiltration to groundwater through lagoons at the Facility, and the septage solids are periodically removed, consolidated and surface disposed at the Facility, or landfilled.
4. On April 9, 2004, DES issued Administrative Order No. WD 04-008 to B&S, which cited B&S with continuing to dispose of septage at the Facility past the September 22, 2003 expiration date of the Waiver Approval dated September 23, 2002 in violation of Env-Ws 1604.02, Section IV.1 of the Closure Plan Approval approved on March 13, 2001 and Section V of the Waiver Approval.

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5. The Order also cited B&S with violating Env-Ws 1608.08 by continuing operation of the Facility with less than the required 2-foot freeboard.
6. Administrative Order No. WD 04-008 ordered B&S to decide by May 15, 2004 if it intended to apply for a Septage Facility Permit, and if it did intend to apply, to apply in accordance with Env-Ws 1608 by August 31, 2004. In the alternative, B&S was required to cease operations and close the Facility.
7. On May 10, 2004, through Sunset Hill Design, DES was informed that B&S intended to apply for a permit.
8. On August 5, 2004, DES performed an inspection of the Facility and noted that the 2-foot minimum freeboard required by Env-Ws 1608.08(e)(2) was not maintained in one of the lagoons.
9. On August 31, 2004, through HYDROTERRA, DES received a Septage Facility Permit Application from B&S.
10. On September 2, 2004, DES wrote to B&S that the Application was incomplete due to lack of compliance with setback requirements. DES allowed B&S until October 15, 2004 to complete the Application.
11. On October 15, 2004, through the Law Office of Geoffrey J. Ransom PLLC, B&S requested an additional 60-day extension to complete the Application.
12. On October 22, 2004, DES granted the extension to December 14, 2004.
13. On December 15, 2004, through the Law Office of Geoffrey J. Ransom PLLC, B&S requested that in light of the proposed revision to the Env-Ws 1600 septage rules, where operation of existing lagoon would be allowed to continue to within 200 feet of a property line, ".the State authorize B&S to continue to operate pursuant to its expired groundwater permit on an interim basis."
14. If the 200-foot setback in the revised rules is adopted, information indicates that B&S will have to move its entire operation in order to comply with the revised setback, or would still need to obtain a reduction in setback waiver from the same property owners that have refused to grant a setback waiver to the existing 500-foot rule.
15. DES personnel have noted that all violations noted in Administrative Order No. WD 04-008 are continuing.

D. DETERMINATION OF VIOLATIONS

1. B&S has violated Administrative Order No. WD 04-008 by not submitting an application for a Septage Facility Permit to DES that is in accordance with Env-Ws 1608.

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E. ORDER

Based on the above findings, DES hereby orders Raymond St. Laurent (B&S) as follows:

1. Immediately cease all discharge of septage to the lagoons.
2. To bring the Septage Facility Permit Application (the Application) into compliance:
 - a) By **February 18, 2005**, B&S shall provide DES either: setback waivers from all affected abutters allowing lagoons in their current locations, or setback waivers from all affected abutters allowing lagoon locations at a specified distance that is less than 500 feet from their property, or a signed statement from B&S or the abutter(s) certifying that some or all of the affected abutters will not grant a setback waiver; and
 - b) By **April 1, 2005**, B&S shall provide DES a Facility Plan in accordance with the current version of Env-Ws 1608.06 showing proposed locations of any septage management activity that complies with: a 200-foot setback (if possible) and a 500-foot setback (if possible) to any abutter property line, or with specific setbacks as granted by abutters; and
 - c) Based upon information developed in Item E.2.a and E.2.b, by **May 16, 2005**, B&S shall provide DES a hydrogeologic study of the facility by a licensed Professional Geologist or Professional Engineer to provide data demonstrating groundwater will not be contaminated beyond AGQS at the proposed groundwater discharge zone by the septage management activities, as required by Env-Ws 1500, and a Groundwater Monitoring Plan complying with Env-Ws 1609.02.
3. Upon successful submission of the information required in E.2, DES shall continue review of the Application in accordance with the current version of the Env-Ws 1600 rules, with recognition of the approval status of the revised rules as they relate to the proposed Facility Plan.
4. Failure by B&S to meet any of the deadlines specified in E.2 shall be deemed as acknowledgement by B&S that septage lagoons are not a viable septage management activity on the property, and that B&S will proceed to close the Facility in accordance with the Septage Facility Closure Plan Approval dated March 13, 2001. Closure of the Facility, with the exception of closure verification groundwater monitoring, shall be completed by **September 1, 2006**.
5. Send correspondence, data, reports, and other submissions made in connection with this Administrative Order, other than appeals, to DES as follows:

Alexis Rastorguyeff, P.E., Residuals Management Section

DES Water Division

29 Hazen Drive P.O. Box 95

Concord, NH 03302-0095

e-mail: arastorguyeff@des.state.nh.us

Fax: (603) 271-4128

F. APPEAL

Any person aggrieved by this Order may appeal the Order to the Water Council by filing an appeal that meets the requirements specified in Env-WC 200 within 30 days of the date of this Order. Copies of the rules are available from the DES Public Information Center at (603) 271-2975 or at <http://www.des.state.nh.us/desadmin.htm>. Appealing the Order does not automatically relieve B&S of the obligation to comply with the Order.

G. OTHER PROVISIONS

Please note that RSA 485-A:43 provides for administrative fines, civil penalties, and criminal penalties for the violations noted in this Order, as well as for failing to comply with the Order itself. B&S remains obligated to comply with all applicable Groundwater Discharge requirements. DES will continue to monitor B&S' compliance with applicable requirements and will take appropriate action if additional violations are discovered.

This Order is being recorded at the Merrimack County Registry of Deeds so as to run with the land.

Harry T. Stewart, P.E., Director
Water Division

Michael P. Nolin, Commissioner
Department of Environmental Services

Certified Mail/RRR: 7099 3400 0003 6154 2232

cc: Gretchen Hamel, DES Legal Unit
Public Information Officer, DES PIP Office
Jennifer Patterson, NH AGO
Mitch Locker, P.G., DES Water Supply Engineering Bureau
Jeremy Lamson, Pittsfield Town Administrator